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May 23, 2011

*VIA E-FILE*

**Attention: Docket No. EP 684**

Surface Transportation Board  
395 E Street, S.W.  
Washington, D.C. 20423-0001

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To Whom It May Concern:

By decision dated March 14, 2011 (Service Date March 24, 2011), the Surface Transportation Board ("Board") issued a Revised Notice of Proposed Rulemaking ("RNPR") amending interim rules noticed in its January 14, 2009 Notice of Proposed Rule Making ("NPR") intended to implement the provisions of the Clean Railroads Act of 2008, Pub. L. No. 110-432, 122 Stat. 4848 ("CRA"). The proposed rules in the RNPR are effective immediately as interim rules until the Board issues a final rule. The RNPR indicated that comments could be submitted to the Board on this revision until May 23, 2011, and that reply comments were due by June 22, 2011.

This letter constitutes the comments of the following parties on the RNPR:

1. National Solid Wastes Management Association, a national trade association representing companies in North America that provide solid, hazardous, and medical waste collection, recycling, and disposal services. NSWMA's members operate in all 50 states and the District of Columbia and share a common mission to manage waste in a manner that is beneficial to the public, environmentally responsible, efficient, profitable, and ethical.

2. The Solid Waste Association of North America, a national not-for-profit association representing solid waste professionals that are employed by local governments and private sector businesses that provide solid waste and recyclables collection, processing, transfer, and disposal. Members of SWANA provide construction and demolition debris, collection, processing, transfer, and disposal services throughout the United States. SWANA's mission is to advance the practice of environmentally and economically sound management of municipal solid waste in North America.

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3. Construction Materials Recycling Association, a non-profit association that promotes the recycling and reuse of construction and demolition materials throughout North America.

4. The Energy Recovery Council, a national trade organization representing the waste-to-energy industry and communities that own waste-to-energy facilities. ERC members own and operate 69 of the 86 modern waste-to-energy facilities that operate nationwide, safely disposing of municipal solid waste, while at the same time generating renewable electricity using modern combustion technology equipped with state-of-the-art emission control systems.

5. The U.S. Conference of Mayors, the official nonpartisan organization of cities with populations of 30,000 or more. There are 1,210 such cities in the country today and each city is represented in the Conference by its chief elected official, the mayor. The Conference promotes the development of effective national urban/suburban policy, strengthens federal-city relationships, and ensures that federal policy meets urban needs.

As a primary matter, we want to state our appreciation for the Board's careful consideration of the comments previously submitted in response to the NPR and for the many changes that the Board implemented in response. As requested by the Board, our comments are limited to the additional changes proposed in the RNPR.

I. Enhanced Notice Procedures are Necessary for Scoping of the EIS and Requests to Reclassify Environmental Review to Ensure Participation by States and Municipalities.

The RNPR adopts a new requirement that applicants seeking a land-use-exemption permit must generally prepare an Environmental Impact Statement ("EIS"). This is a significant step toward ensuring that solid waste rail transfer facilities "fully comply with the substantive and procedural requirements in State and Federal environmental and public health and safety laws" as Senator Lautenberg, lead author of the CRA provisions, stated on the floor of the Senate just prior to adoption of the relevant provisions of the CRA by the Senate. 154 Cong. Rec. S-10286 (daily ed. Oct. 1, 2008) (statement of Sen. Lautenberg). However, the Board should extend the broad notification requirements of the Notice of Intent and Application to the early stages of the EIS process in order to ensure public notice of, and participation in, these critical steps of the process.

The CRA requires the Board to adopt procedures that provide "notification of the municipality, the State, and any relevant Federal or State regional planning entity" in order to provide the opportunity for the public notice and comment on the submittal and review of land-use exemption procedures. 49 U.S.C. § 10909(b)(2). Accordingly, the RNPR regulations require the Notice of Intent and the Application to each be mailed to the governor, the municipality, the state, and federal or state regional planning entities where the facility is to be

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located. 49 C.F.R. §§ 1155.20(2), 1155.22(b). The Notice of Intent must also be published in one newspaper of general circulation in the county in which the proposed facility is to be located for three consecutive weeks. 49 C.F.R. §§ 1155.20(3). As evidenced by these provisions, the Board understood that reliance on notices in the Federal Register alone would not be sufficient to ensure the critical participation of those at the state and local level in this process.

In contrast to the expansive notification requirements for the Notice of Intent and Application, the regulations governing the early stages of the EIS process do not provide broad notification, potentially undermining the statutory intent to ensure that interested municipal, state and regional planning entities can meaningfully participate in the EIS process for projects seeking land-use exemptions. When projects require preparation of an EIS, project proponents must provide the Section of Environmental Analysis with a written notice at least six months prior to filing an application with the Board pursuant to 49 C.F.R. § 1105.10(a)(1). No additional notice is required of such a filing. Consequently, interested parties lose the ability to participate in the important discussions and scoping that precede the formal publication of an EIS scope document, including the critical consideration by SEA of whether to require an EIS at all. When an EIS is required to be prepared, the Board is only obligated to provide a limited published notice in the Federal Register with a description of the proposed action and a request for written comments on the scope of the EIS. Although the scoping process may include a public meeting, no notice beyond that published in the Federal Register is required. In fact, not until the draft EIS is prepared is the Board obligated to distribute notice or copies regarding the EIS process to state or municipal entities.

The absence of inclusive notice requirements for the early stages of the EIS process means that states, municipalities, and regional planning entities will be effectively excluded from the key EIS scoping proceedings that ensure the environmental review sufficiently investigates potential environmental impacts of the land-use-exemption permit, particularly where an applicant seeks to avoid an EIS or to complete the EIS process before a formal application is filed with the Board. As the bulk of the controversy involving these facilities in the past has centered on the abuse of ICCTA preemption to avoid important state and local environmental and public health controls; a full opportunity for participation by state and local stake holders in the environmental scoping and review is critical to this process.

Similarly, the RNPR regulations at 49 C.F.R. § 1155.24(a) provide that an applicant may make a written request to reclassify the environmental review requirements of land-use-exemption proceedings under 49 C.F.R. § 1105.6(d) in order to avoid preparation of an EIS altogether. Absent changes in the regulation, such a written request will not even be subject to notice in the Federal Register, let alone notice to states and municipalities in a manner similar to Notices of Intent and the Application itself.

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Enhancing the notice requirements for the early stages of the EIS process would be consistent with the public involvement directives for NEPA proceedings at 40 C.F.R. § 15.06. Those regulations instruct all federal agencies that when an action affects “primarily local concern,” public notification may include, for example, notices to states and potentially interested community organizations and publicity through local newspapers and media. 40 C.F.R. § 15.06(3). Similarly, in its NEPA implementation rules, EPA itself has agreed “to the greatest extent possible, [to] give notice to any state and local government [that] may be affected by the action for which EPA plans to prepare an EA or an EIS.” 40 C.F.R. § 6.203(4).

Meaningful review of and participation in these preliminary stages of the EIS process demand adequate notice similar to that for Notices of Intent and the Application and consistent with the directives to other agencies when administering the NEPA process.

II. Allowing the Applicant to Include in a Permit Application Any and All Statutes, Regulations, and Rules it Wants to Challenge is an Unreasonable Burden on All Other Parties.

The key preliminary consideration for the Board in determining whether to grant a land-use-exemption permit is whether a particular statute, regulation, or rule constitutes a requirement “affecting the siting.” The Board dismissed comments from several entities calling for a definition of this term, instead leaving it to a case-by-case determination. (*See* RNPR at 11). As a result, the burden effectively shifts to the states and municipalities to (i) constantly monitor filings with the Board and (ii) advocate for their own statutes, rules, and regulations. States and municipalities will be forced to marshal complicated arguments concerning whether their laws fall under the traditional police powers and whether these laws unreasonably burden the interstate transportation of solid waste by railroad or discriminate against the railroad transportation of solid waste and a solid waste rail transfer station. Moreover, because the applicant creates the list of state, local, and municipal laws, regulations, orders, or other requirements that the applicant believes affect the siting of the proposed facility (and is incentivized to maximize that list), the burden for states and municipalities increases dramatically.

The RNPR regulations contemplate that an applicant may have already sought permission from a state, local, or municipality authority and received an “unsatisfactory result.” *See, e.g.*, Proposed Rule at 49 C.F.R. § 1155.21(17). In order to reduce the burden on states and municipalities that will be required to defend their statutes, regulations, and rules and the burden on the Board to make individual determinations for each of these laws, the Board should require as a prerequisite that an applicant seek state or local approval under the challenged laws and rules before they can be included on the list to be preempted under 49 C.F.R. § 1155.21(7), unless it is demonstrably futile to do so. This process would narrow the inquiry of which laws are truly standing in the way of the development of the proposed facility and would also help

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develop the positions of the parties on questions concerning police powers and burdens on interstate transportation.

Alternatively, an applicant should be required to seek legal opinions from the state attorney general's office and/or municipal town counsel with respect to these issues during the application process, which would again narrow the inquiry, focus any dispute, and help develop the positions of the parties on police powers and burdens on interstate transportation. In addition, this would ensure that governmental authorities whose laws are the subject of challenge are provided clear notice and ability to participate in the proceedings.

Thank you for the opportunity to submit these comments. We believe that the RNPR is a considerable improvement over the NPR, and we appreciate the careful and thoughtful response from the Board to the many comments on the NPR. We continue to have concerns about a number of the issues we raised in the NPR as well as these additional issues raised here. We urge the Board to make the changes to the proposed rules suggested here.

Very truly yours,



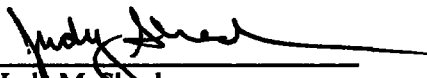
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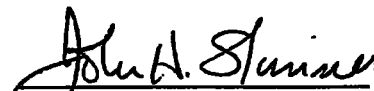
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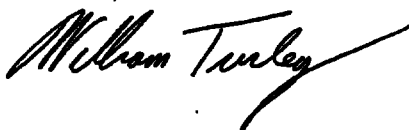
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